(12)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A.No 779 सन् 200|

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

APPELLANT:
(In Jail)

Jawahir Singh, S/o Sumaru Gond, aged about 25 years, R/o Funga Sihardand, P.S. Khadgawaon, District Koriya (Chhattisgarh)

-Versus-

RESPONDENT:

State of Chhattisgarh, Through P.S. Khadgawaon, District Koriya.

(Criminal Appeal under Section 374 (2) of the Cr.P.C.)

Division Bench: -

Hon'ble Shri L.C. Bhadoo &

Hon'ble Shri Sunil Kumar Sinha, JJ.

7-9-2007:-

Miss Minu Banerjee, Advocate for the appellant.

Mr. U.K.S. Chandel, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais*.

L.C. Bhadoo, J.

This appeal is directed against the judgment of conviction and order of sentence dated 28-7-2001 passed by the Additional Sessions Judge, Manendragarh, in S.T. No.61/2001 whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the I.P.C., for committing the murder of Jagesia, sentenced him to undergo imprisonment for life & to pay a fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 6 months.

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

The case of the prosecution, in brief, is that on 28-10-2000 Jagesia (since deceased) along with her sister Bilsiya Bai (PW-1) & mother Rukman Bai (PW-2) left her house for catching fish in the river. When they were catching fish at about 2 p.m. the accused came there. The ladies requested him to help them in removing the water, but he refused to do so. On the contrary, he asked them that as his sister is not well, therefore, Jagesia be sent along with him to see his sister. The accused was suspecting that Jagesia is practicing witchcraft. On the request of the accused Jagesia was sent along with the accused. Jagesia did not return. When mother and sister of Jagesia returned to their house, Jagesia was not present there, then they enquired from the house of the accused. On enquiry, mother of the accused said that the accused and Jagesia have not come to her residence. On enquiry in the night, father of the accused said that the accused has gone in search of some person who can provide treatment to his daughter. Bilsia Bai informed about the incident to Sarpanch of the village and other villagers. Next day people started searching Jagesia in the forest. Banshlal could locate the body of Jagesia in the forest at some distance from the village. There was injury on her neck. He informed the villagers. In turn, Dehati Nalishi Ex.P/1 was given by Bilsia Bai in the Police Station Khadgawaon, based on that first information report Ex.P/1-C was registered. Merg intimation Ex.P/2 was also given by Bilsia Bai. The Station House Officer, Police Station after registering the crime left for scene of occurrence & prepared inquest Ex.P/3 on the body of Jagesia. While in the police custody, the accused gave memorandum Ex.P/4, in pursuance of that he got recovered knife under Ex.P/5. Plain soil and blood stained soil was seized from the place

मामला क्रमांक..... **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

of occurrence. The body of Jagesia was sent for postmortem examination to the Primary Health Centre, Khadgawaon under Ex.P/7-A. The postmortem on the body of Jagesia was conducted by Dr. R.P. Singh (PW-9). He prepared postmortem report Ex.P/14 & opined that cause of death is due to stoppage of heart's action resulting from injury of (large vessels) right carotid artery. Death is homicidal in nature. Site plan Ex.P/10 was prepared by the investigating officer. Site plan Ex.P/8 was prepared by Patwari. Knife and other articles were sent for chemical examination to the Forensic Science Laboratory, Sagar, from where report Ex.P/13 was received. The knife in question was sent for examination to the doctor. The doctor after examination opined that injury on the neck of Jagesia could be caused by knife in question. He gave his report Ex.P/15.

After completion of the investigation, charge sheet was filed against the accused in the Court of Judicial Magistrate, 1st Class, Manendragarh, who in turn committed the case to the Sessions Judge, Ambikapur from where learned Additional Sessions Judge received the case on transfer for trial.

The prosecution in order to establish the charge against the accused examined 9 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C. in which he denied material appearing against him in the prosecution evidence, stated that he is innocent & has been implicated in a false case. He further stated that witnesses have deposed against him on account of animosity.

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Learned trial Court after hearing learned counsel for the respective parties, convicted and sentenced the accused as aforementioned.

We have heard Miss Minu Banerjee, counsel for the appellant and Mr. U.K.S. Chandel, Panel Lawyer for the State/respondent.

Miss Minu Banerjee has not disputed homicidal death of Jagesia. Moreover, PW-9 Dr. R.P. Singh, who conducted the postmortem on the body of the deceased, has stated that on 30th October, 2000 he conducted postmortem on the body of the deceased. He found that there was incised wound on neck in the size of 2½" x 1½". Wind pipe & carotid artery were cut. There was bleeding from injury. Injury was ante mortem in nature. Cause of death was on account of cutting of wind pipe. Death was homicidal in nature. Therefore, in view of the above evidence, it is established that death of Jagesia was homicidal in nature.

As far as involvement of the accused in the crime in question is concerned, there is no direct evidence to connect the accused with the crime in question. The whole case rests on the circumstantial evidence. As per the settled law in order to convict an accused based on the circumstantial evidence, the Hon'ble Apex Court in the matter of **Dhananjoy Chatterjee Vs. State of W.B.**[1] held that:

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should

[1] (1994) 2 SCC 220

बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

The prosecution has tried to establish the crime against the accused based on the following circumstances:-

- That Jagesia left along with the accused before her death,
- That knife, weapon of offence, was recovered at the instance of the accused & as per the FSL report human blood was found on the knife.

Having heard learned counsel for the parties, we have scrutinized evidence. As far as first circumstance is concerned, PW-1 Bilsia Bai has stated that on the fateful day her father asked them that today he will eat dish of fish, therefore, she along with her younger sister Jagesia and mother went to river in order to catch fish, at that time, the accused came

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

there. They asked him to remove water so that they can catch fish but he refused to do so. Thereafter, the accused asked them that his sister is not well & she is at his residence, therefore, Jagesia should accompany him to see his sister. Jagesia was sent with the accused. About two hours thereafter they went to their house at about 4 p.m., they saw that Jagesia was not at their residence. Even enquiries were made but Jagesia was not at the residence of the accused. Her daughter Hirodiya Bai was sent to the house of the accused but neither the accused nor Jagesia were at the residence of the accused. Thereafter, Sarpanch of the village was apprised about the said fact. A search was made about whereabouts of Jagesia but she could not be located. On the next day, body of Jagesia was seen by Bansh Kumar in the forest. There was injury on her neck. The matter was reported in the Police Station.

PW-2 Rukman Bai, mother of Jagesia, has corroborated the evidence of Bilsia Bai. Sarpanch of the village has been examined as PW-6. He has stated that Bilsia Bai and her mother came to his house & informed that Jagesia was with them on the river, from there she has gone somewhere & her whereabouts could not be traced out. Next day body of Jagesia was found 400 yards away from the place. There was injury on her neck.

In order to connect the accused based on last seen theory, in the matter of **BODHRAJ ALIAS BODHA AND OTHERS Versus STATE OF JAMMU & KASHMIR**[2] the Apex Court held that;

[2] (2002) 8 SCC 45

बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

> "The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive together and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

In the matter of **Subhash Chand Vs. State of Rajasthan**[3] the Apex Court has held that last seen together must be near about the date and time of the incident. Merely, on the basis of last seen, the accused person cannot be held guilty. The Apex Court further held that;

> ".....To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were last seen together at the point of time in close proximity with the time and date of commission of crime...."

Again in the matter of **State of Karnataka Vs. M.V. Mahesh**[4] the Apex Court held that:

[3] (2002) 1 Supreme Court Cases 702
[4] (2003) 3 Supreme Court Cases 353

GRPRJ — FS/246— 2/2007 — 50,000.

बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

"..... Merely being seen last together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the victim Beena had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together...."

Again, in the matter of **State of Goa V. Sanjay Thakran and Anr.**[5] the Apex Court held that:-

"There can be no fixed or straight jacket formula for duration and the time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, this is to say, if the prosecution is liable to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Therefore, in view of the judgment of the Apex Court in the matter of State of Karnataka V. M.V. Mahesh (Supra) in order to connect the accused with the crime in question, merely seen last

[5] 2007 (4) SBR 321

GRPRJ — FS/246— 2/2007 — 50,000.

बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

together is not enough. What has to be established in the case is definite evidence to indicate that the accused is the author of the crime in question. Apart from last seen evidence, there must be other circumstantial evidence and material on record through which an irresistible inference can be drawn that the accused was author of the crime in question."

In the light of above legal position, if we look into evidence and facts of the present case, as per the evidence of Bilsia Bai and Rukman Bai, at about 2 p.m. the deceased accompanied the accused, next day body of the deceased was found in the forest. They have stated that Sarpanch of the village was informed by them but Sarpanch of the village has been examined as PW-6. He has not stated that he was informed by Bilsia Bai and Rukman Bai that Jagesia had left the river along with the accused. Therefore, evidence of Sohan Singh (PW-6) does not support the evidence of these two witnesses. Moreover, the time gap between when Jagesia left the river along with the accused & her body was found is about one night and half day. Moreover, the body was found in the forest. There is no other incriminating circumstance through which inference can be drawn that the accused was author of the crime in question. The accused being maternal cousin & there is no evidence or material on record or circumstantial evidence adduced that the accused was having any grudge against the deceased in order to commit her murder. The prosecution case is that the sister of the accused was not well & the accused was suspecting that Jagesia was practicing witchcraft, but there is not an iota of evidence on record to show that the accused

FS/246— 2/2007 — 50,000.

बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

was suspecting that Jagesia was practicing witchcraft. Even PW-1 Bilsia Bai and PW-2 Rukman Bai have not stated in their evidence that the accused was suspecting that Jagesia was practicing witchcraft, that was the reason for the accused to commit her murder.

Therefore, for the foregoing reasons merely on the basis of the fact that Jagesia Bai left the river along with the accused without any other corroboration or other material on record, it is difficult to connect the accused with the crime in question.

As far as second circumstance is concerned, the knife in question said to have been recovered at the instance of the accused, as per the FSL report, human blood was found on the knife, but there is no report that human blood was of the blood group of the deceased without which merely on the basis of recovery of knife the accused cannot be connected with the crimes in question unless and until there is positive evidence that the blood which was found on the knife was of the blood group of the deceased. There is no other evidence against the accused to connect him with the crime in question.

In the circumstances, we are of the considered opinion that based on above circumstantial evidence the prosecution has failed to establish with cogent, clear and legal circumstantial evidence beyond reasonable doubt that the accused was author of the crime in question. Therefore, conviction and sentence imposed upon the accused/appellant for commission of murder of Jagesia Bai cannot be sustained.

बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
Barve	In the result, the appeal succeeds. Conviction and sentence imposed upon the accused/appellant under Section 302 of the I.P.C. are set aside. If the accused is not required in any other case, then he should be set at liberty forthwith. Sd/- L.C.BHADOO Judge	Sd/- Sunil Kumar Sinha Judge

GRPRJ — FS/246— 2/2007 — 50,000.

बिलासपुर